IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-370

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO;

and

HECK'S, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF HECK'S, INC.

and

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF HECK'S, INC.

MILTON A. SMITH
General Counsel
RICHARD B. BERMAN
Labor Relations Counsel
THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
1615 H Street, N. W.
Washington, D. C. 20006

GERARD C. SMETANA
Suite 6800
233 South Wacker Drive
Chicago, Illinois 60684
Attorneys for the Amicus Curiae

Gunthorp-Warren Printing Company, Chicago 6 346-1717

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-370

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO;

and

HECK'S, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF HECK'S, INC.

The Chamber of Commerce of the United States of America respectfully requests leave to file a brief *amicus curiae* in support of the position of Heck's, Inc. In support of this motion the Chamber states:

1. The Chamber is a federation of more than 3,700 state and local chambers of commerce and trade associations, with an underlying membership of more than 5,000,000 business firms. It is the largest association of business and professional organizations in the United States.

2. One of the questions presented in this case—*the* critical question in the Chamber's view—is whether the Board has the power to assess litigation expenses and organizational costs to an unsuccessful respondent in a Board proceeding. Because many of the Chamber's members might be subject to substantial attorneys' fees and organizational costs under the decision of the court below, the propriety of the Board or a court assessing such costs is a matter of substantial concern to the Chamber.

3. The Chamber, in support of Heck's, Inc., urges a different theory than that presented by the Board and the Union who are primarily concerned with the relationship between the Board and the Courts of Appeal. The Chamber, unlike the Board and the Union, submits that *neither* the Board nor the courts have the power, under the National Labor Relations Act, to require an unsuccessful party in any Board proceeding to reimburse either the Board or another party for their litigational expenses. Accordingly, the practice of granting such a remedy, commenced by the Board in *Tiidee Products*, 194 NLRB 1234 (pet. rev. pend. D. C. Cir.), and reasserted by the court below in this case, must now be halted.

4. The questions at issue here thus transcend the interest of the particular parties involved. In similar circumstances this Court has permitted the Chamber to file briefs *amicus curiae*. See, *e.g.*, *N. L. R. B.* v. *H. K. Porter*, 397 U. S. 99 (1970); and *Griggs* v. *Duke Power Company*, 401 U. S. 424 (1971).

The instant matters are of equal importance to emloyers across the nation. For these reasons, the Chamber respectfully requests leave to present its views.[1]

Respectfully submitted,

MILTON A. SMITH
General Counsel

RICHARD B. BERMAN
Labor Relations Counsel
THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
1615 H Street, N. W.
Washington, D. C. 20006

GERARD C. SMETANA
Suite 6800
233 South Wacker Drive
Chicago, Illinois 60684
Attorneys for the Amicus Curiae

1. The Chamber regrets that this brief must be submitted so near oral argument. This delay, however, was unavoidable; Heck's was not granted intervention, and hence the right to file a brief, until January 25, 1974 and did not submit its brief for filing until March 4, 1974. The Chamber, in order to support the position of Heck's, had to assess Heck's brief before it could submit its own.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-370

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO;

and

HECK'S, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF HECK'S, INC.

This brief *amicus curiae* on behalf of The Chamber of Commerce of the United States of America is filed contingent upon the Court's granting the foregoing motion for leave to file a brief *amicus curiae*.

INTEREST OF THE AMICUS CURIAE

The interest of the Chamber is set forth in its annexed motion for leave to file a brief *amicus curiae*.

ARGUMENT

1. Both the Board and the Courts are statutorily limited by the Act in the remedies which they may prescribe. The threshold question in the case, accordingly, is whether the Act allows the Board, in the first instance, to grant a reimbursement, to either the Board and/or a charging party, of litigation expenses or additional organizational costs. For it follows *a fortiori* that, if the Board is so limited, the Act likewise limits the courts from granting such relief. The question of the appropriate tribunal to grant such a remedy—the primary question presented by the Board and the Union—is academic when, as Heck's and the Chamber contend, neither tribunal has such power under the Act. This Court has repeatedly emphasized that the Act, and not the Board or the courts, is the ultimate limiting factor in determining what remedies can be meted out by the Board in correcting unfair labor practices. As this Court cautioned in *Nathanson* v. *N. L. R. B.*, 344 U. S. 25, 29 (1952), in overruling a Court of Appeals' decision approving the Board's determination that the Act permitted back pay claims to be given priority in bankruptcy proceedings, "[W]hether that should be done is a legislative decision".[1]

2. Unlike the federal courts, the Board has no inherent equitable powers; the Board, like other administrative agencies, is "entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do." *C. A. B.* v. *Delta Air Lines*, 367 U. S. 316 (1961).

This Court has repeatedly emphasized that punitive relief, such as that imposed by the court below, is ". . . clearly not granted to the Board by the Federal Acts." *International Union,*

1. See also *H. K. Porter* v. *N. L. R. B.*, 397 U. S. 99 (1970); *Switchmens Union of North America* v. *National Mediation Board*, 320 U. S. 297, 301 (1943); and *Commissioner* v. *Brown*, 380 U. S. 563, 579 (1964).

U. A. W. v. *Russell*, 356 U. S. 634, 646 (1958); *Republic Steel Corporation* v. *N. L. R. B.*, 311 U. S. 7, 10-12 (1940). To the contrary, remedies imposed by the Board must be remedial in nature. See Morris, *The Developing Labor Law*, Bureau of National Affairs, Inc. (Washington, D. C. 1971), p. 844. Furthermore, the Act sets up no general compensatory procedure except in such minor supplementary ways as the reinstatement of wrongfully discharged employees with backpay. *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656, 605 (1954). Accordingly, those persons seeking full compensatory relief must look elsewhere "since such items of recovery are beyond the scope of present board remedial orders." *U. A. W.* v. *Russell*, at 646.[2]

Attorneys' fees and organizational costs must be considered punitive and collateral and beyond the Board's powers. Such relief will not make employees whole for any losses they have suffered. Inasmuch as such relief will be discriminatorily handed out, it can only be regarded as punishment to the respondent in those cases where the Board or the courts are of the opinion that the respondent has engaged, as found here by the court below, in "clearly aggravated or pervasive misconduct" and "flagrant repetition of conduct previously found unlawful." *Food Store Employees Union Local No. 347* v. *N. L. R. B.*, 476 F. 2d 546, 551 (D. C. Cir. 1973). Since such relief will issue to deter future conduct, and not to make employees whole for any losses they have suffered, organizational costs and litigation

---

2. Thus, in *Operating Engineers Local 513*, 145 NLRB 554 (1963), the Board denied backpay to employees for lost work time caused by the physical assault of union agents, and in *St. Clair* v. *Teamsters Local 515*, 442 F. 2d 128 (6th Cir. 1969), collateral injuries, such as the loss of a home for inability to make mortgage payments, were deemed beyond the Board's remedial powers. An employer's business losses occasioned by unlawful strikes or picketing would also be denied in an unfair labor practice proceeding. In short, "collateral losses are not considered in framing a reimbursement order." *Republic Steel Corp.* v. *N. L. R. B.*, 311 U. S. 7, 11-12 (1940).

expenses must, it is submitted, be considered punitive and beyond the Board's powers.

3. The power to order the reimbursement of litigation expenses cannot be implied. It must be grounded on the express language of the law. *Fleishmann Corporation* v. *Maier Brewing Co.*, 386 U. S. 714, 720 (1967). The National Labor Relations Act, however, contains no such express provision, as exists under a variety of federal regulatory laws,[3] including those in the field of labor relations,[4] nor even a provision as in *Fleishmann* providing for the "costs of the action" which, notwithstanding the "deliberate" and "willful" violations there involved, was deemed insufficient to permit such an award. Indeed, an analysis of the legislative history of both the Wagner and Taft-Hartley Acts indicates that Congress squarely faced the question of damage awards and concluded that such a remedy was inappropriate to Board proceedings.[5] It must be

3. See, *e.g.*, Clayton Act, § 4, 15 U. S. C. § 15; Communications Act of 1934, § 206, 47 U. S. C. § 206; Copyright Act, 17 U. S. C. § 116; Interstate Commerce Act, § 16, 49 U. S. C. § 16(2); Packers and Stockyards Act, § 309(f), 7 U. S. C. § 210(f); Perishable Agricultural Commodities Act, § 7(b), 7 U. S. C. § 499g(b); Securities Act of 1933, § 11(e), 15 U. S. C. § 77k(e); Securities Exchange Act of 1934, §§ 9(e), 18(a), 15 U. S. C. §§ 78i(e), 78r(a); Servicemen's Readjustment Act, 38 U. S. C. § 1822(b); and Trust Indenture Act, §§ 323(a), 53 Stat. 1176, 15 U. S. C. § 77www(a).

4. See, *e.g.*, Civil Rights Act of 1964, as amended, §§ 706(k), 42 U. S. C. 2000e-5(k); Fair Labor Standards Act §§ 16(b), 29 U. S. C. §§ 216(b); Railway Labor Act, § 3(p) 45 U. S. C. § 153(p). Significantly, even the substantially stronger language of Section 303 of the Labor Act, which allows any person injured by an unlawful secondary boycott to "recover the damages by him sustained and *the cost of the suit*" (emphasis added), has been consistently construed as not *authorizing* the prevailing party to recover attorneys fees. See, *e.g.*, *Teamsters Local 20* v. *Morton*, 377 U. S. 252, 260, n. 16 (1964).

5. Thus a specific provision permitting the Board to order violators to "pay damages", found in the Taft-Hartley Act as originally introduced (S. 2926, 73d Cong., 2d Sess.; 1 Leg. Hist. of the Tart-Hartley Act, pp. 6-7), and an even milder provision allowing "restitution" (1 Leg. Hist. 2465), were later deleted follow-

presumed, therefore, that had Congress intended to confer upon the Board or courts the extraordinary powers here involved, such powers would have expressly been granted as in the case of other agencies[6] or as in the case of federal appellate litigation.[7] "It may well be true," as this Court observed of a similarly broad reading of the Board's remedial powers in *H. K. Porter* v. *N. L. R. B.*, 399 U. S. 99 (1970), "that the present remedial powers are insufficiently broad to cope with important labor problems," but, "it is the job of Congress, not the Board or the Courts . . ." to correct such alleged deficiencies.

4. In *Hall* v. *Cole*, 412 U. S. 1, 5, n. 7 (1973), this Court upheld the award of attorneys' fees to a private litigant in a suit under § 102 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. § 412. This Court indicated, however, that, absent a controlling statute or contract, such an award is permissible only where (a) it seeks to punish contemptuous conduct; (b) it confers "a substantial benefit on the members of an ascertainable class . . ." (*Mills* v. *Electric Auto Lite Co.*, 396 U. S. 375, 393-394) or (c) possibly where the plaintiff is acting as a "private attorney general." None of

ing extensive hearings in both the House and Senate. The final version of the bill, as reported by both Congressional committees, only authorized the Board " . . . to take such affirmative action, including reinstatement with or without backpay as will effectuate the policies of this Act." S. 1958, as reported, 2nd Sen. Print, II Leg. Hist. 2292; H. R. 7978, as reported, 2nd House Print, II Leg. Hist. 2905; see also, H. Cont. Rep. No. S10 at 54, 80th Cong., 1st Sess., II Leg. Hist. 2931. Similarly, in considering a proposal to give the Board authority to assess damages for breach of collective bargaining agreements or in secondary boycott cases under the Taft-Hartley amendments, the chief sponsor of the bill, Senator Taft, noted that there then existed "no possibility of a suit for damages" under the Board's extant powers. 93 Cong. Rec. 4858 (1947). Congress determined, however, that even the authority to assess limited damages should be lodged only in the courts under Sections 301 and 303 of the Act.

6. See notes 3 and 4, *supra*.

7. See, *e.g.*, 28 U. S. C. § 1912 permitting federal courts of appeals or this Court to assess single or double damages against the losing party.

these considerations are present in this case. There is, here no contemptable conduct, common fund or class within the meaning of *Mills*, no "private attorney general" nor need to encourage private litigation to vindicate public rights. There is no basis, in sum, to apply any of the "limited exceptions" to the general rule disfavoring the award of attorneys' fees. *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. at 717-718; *Hall* v. *Cole*, 412 U. S. at 5.[8]

CONCLUSION.

WHEREFORE, for all of the foregoing reasons, as well as those set forth in the brief for Heck's, the Chamber respectfully submits that the decision below must be reversed.

Respectfully submitted,

MILTON A. SMITH
General Counsel

RICHARD B. BERMAN
Labor Relations Counsel
THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
1615 H Street, N. W.
Washington, D. C. 20006

GERARD C. SMETANA
Suite 6800
233 South Wacker Drive
Chicago, Illinois 60684
Attorneys for the Amicus Curiae

8. For many of the same valid reasons that preclude the Board from awarding attorneys' fees, the Board is likewise precluded from awarding the reimbursement of organizational expenses. In addition, such an award would be pure conjecture because there is no way of adequately assessing the effect of the Company's practices on the employees sought to be organized. Hence, such an award might unjustly foist upon the Company the organizational business expenses of the Union.